

NATIONAL LABOR RELATIONS BOARD X  
In the Matter of:

Triumph Construction Corp., Inc.,  
Employer,

And

Local 1010 Highway, Road & Street Construction  
Laborers Union,  
Petitioner,

Case 29 RC 126206

And

United Plant & Production Workers, Local 175,  
IUJAT, Intervenor.

X

INTERVENOR'S RESPONSE TO PETITIONER'S REQUEST FOR REVIEW  
OF REGIONAL DIRECTOR'S DECISION AND ORDER

Intervenor, Local 175, United Plant & Production Workers, IUJAT submits this response to Petitioners request for review of the Regional Director's decision and order in the above referenced matter. First, Local 1010 fails to note that its collective agreement currently is in effect until June 30, 2015—a year from now, and that its existing contract is a contract bar to their request to expand their "concrete only" unit to include persons who primarily perform asphalt paving. What essentially Local 1010 is seeking is a unit clarification, mid term, of its existing Certification, for persons who primarily perform asphalt paving, to include persons who primarily, in their daily work, perform asphalt paving. Unit Clarifications, mid term, are generally not permitted.

Second, it is clear from the record that Local 1010's work has not changed since the 2006 Certification as representative of persons who primarily perform "concrete" work. There has been no change in how ditches are dug, how water

mains are placed, or how concrete curbs are set. Just like there has been no change in how utility asphalt paving has been performed over the last several decades. So the expansion of Triumph in the number of employees it employs doing various tasks does not change the nature of the work that members of 1010 or Local 175 physically perform; Triumph's growth does not change the nature of the work performed by either Local 1010 members or Local 175 members. In fact, Local 1010's complement of workers at Triumph has grown from approximately 6 workers in 2006 to 35; whereas Local 175's has grown from 1 to 6; about the same percentage growth for each. Third, Local 1010 did not seek a Self Determination Election among the Asphalt Paving crew of Triumph; but rather only sought a single election using its 35 members to overwhelm the sub set of workers represented by Local 175; who do not have a community of interest with Local 1010 workers.

In regard to the concept that there is a substantial change in the work performed there is no evidence to support such an assertion. The contracts won by Triumph may be larger in scope; but the work ripping up sidewalks, roadways to lay pipe or to install sewers and water catch basins is the same. Concrete workers build forms into which to pour concrete the same way they always did; and asphalt paving is done the same way it always was done.

The real question here is Local 1010's claim that its members also perform primarily asphalt paving in their work. But it is clear from the record that they do not primarily perform asphalt paving; that asphalt paving is an incidental part of the work performed by Local 1010 members; that Triumph has no "dedicated" 1010 members who only do asphalt paving; there is no dedicated crew of workers

performing asphalt paving made up of only Local 1010 members; and it is clear from the record that all of the so called production asphalt paving that requires the use of a milling machine or a spreader, where a road is paved curb to curb; is sub contracted out to contractors under agreement with Local 175. (T. 559-560)

The record demonstrates that Triumph employs a core group of 4 Local 175 members who form a dedicated asphalt paving crew; who perform no other work for Triumph other than finished asphalt paving (and the rare temporary asphalt paving). (T. 483,560, 614) The dispute here substantially lies with the spreading of "temporary asphalt" that is needed to protect a job site; (trenches, open roadway); as the job of installing pipe, drains, sewers, etc. progresses or once installation thereof is finished; but before Finish asphalt is paved by the dedicated asphalt paving crew. The testimony is that although 1010 members do temporary asphalt to make a road safe at the end of the day; the dedicated Asphalt Paving crew never does. (T. 562). It is undisputed that upon analysis Local 1010 workers do not primarily perform asphalt paving; not even close. Their main job is excavation, work on site preparation and laying of concrete curbs, sidewalks, and concrete or stone road-base. The record shows that in performing their job they only spend about 1% of their time working with asphalt at the end of their work day. (T.580-581 (asphalt around a manhole cover is a 5 minute job), T.591-592 (1010 members time spent doing asphalt is about 1% of their time), T. 625).

In contrast, Local 175 members who work on the Asphalt Paving crew, only work paving asphalt. (T. 561) They do not excavate, shore-up ditches, lay pipe or sewers or water mains. If there is no asphalt paving work for them they are sent

home. (T 520, 565, 617) The dedicated asphalt paving crew members can't do what the Local 1010 members do on these jobs. (T. 565) They have separate supervision, different wages and benefits that historically are warranted due to the nature of the work; they do not have the skills of Local 1010 workers to lay concrete or excavate or lay pipe, wire, etc. as they only pave asphalt; they have little if any contact with Local 1010 members (T. 537, 584-585) (if there is no work for them they are sent home; (T. 589-590 where William Licata, part owner of Triumph stated that "my 175 guys, they're hired to pave. They don't have any other skills as far as I know. And, they haven't ever been paid to do anything else. So, I don't use them."). The 175 guys generally are performing finished paving when the work of 1010 members is completed at the job site; (note that after the concrete road base is poured days need to go by before finish asphalt paving can be performed, when the 1010 concrete pouring crew is done with its work—T. 583- 586); and their paving work is not functionally integrated as they use different equipment, their trucks have different equipment; they are the only crew that has its own dedicated "fire box" to heat AC material; and their own dedicated drive on roller to compress the asphalt. The asphalt paving crew does not have the equipment or material to perform the laying of concrete.

It is also clear from the record that there is no dedicated crew of Local 1010 members who primarily perform asphalt paving. (T. 563, 578) Local 1010 members are paid less money and have different benefit fund contributions paid in regard to their work. (See Contract Exhibits) That is one reason the company may be in favor of using 1010 represented workers to perform a minor, perfunctory

chore at the end of a day of pushing some temporary asphalt over a ditch to make it safe for cars and pedestrians.

Local 1010, moreover, did not seek a self determination election amongst the dedicated asphalt paving crew. In fact, as the Local 175 workers who worked on that crew were specifically identified in that hearing (T. 481); it was simple for the Regional Director to realize that Local 1010 had no showing of interest in regards to that group of workers that it now wanted to add to its existing Certification. Local 1010 apparently only produced authorization cards from its own members who do not do the work of the dedicated asphalt paving crew.

The bargaining history of the asphalt paving industry and laying of concrete industry in New York City is well documented in Region 29. In 2005 Local 1010 filed over 700 petitions for election to obtain certifications in two distinct groups of workers---those that primarily performed asphalt paving; and those that primarily performed the laying of concrete; to the exclusion of the other. This formulation existed because it was known and accepted that there were two distinct functions; two distinct groups of workers; and that they each ministerially when necessary did some work of the other group; which is why the phrase "primarily perform" was developed. Nothing has changed from that original formulation of an appropriate unit other than the fact that Local 1010, the historical concrete workers union of LIUNA merged with Local 1018, the historical asphalt workers union of LIUNA, (a merger caused in principal part due to 1018's members defecting to Local 175 over the years). In 2010 Local 1018 merged into Local 1010, and along with it, Local 1010 changed its collective agreements to include the work of its new jurisdiction of

asphalt paving. It now had a few new members that primarily performed asphalt paving and Local 1010 now had a new jurisdiction to claim. However, in order to claim that asphalt jurisdiction in this case it is attempting to claim that the work of a person who primarily performs asphalt paving is the same work as the person who primarily performs the laying of concrete; but the jobs are two distinct jobs.

Triumph employs no Local 1010 member who primarily performs asphalt paving, (T. 579)(other than the supervisor of the dedicated asphalt paving crew), there is no dedicated asphalt paving crew made up of Local 1010 members; and 1010 members spend at most only 1% of their daily work dealing with asphalt. All the other time they are performing other functions; none of which are performed by the dedicated asphalt paving crew. (T. 578-583)

Local 175 has had a contract with Triumph for many years, since 2005. Several of its members have worked there over the years doing asphalt work. In about 2010 the company wanted to start a dedicated asphalt paving crew and did so using Local 175 members pursuant to its collective agreement with Local 175. Had Local 1010 disputed that assignment of work they could have done so in several ways—through arbitration against the company or by filing an Ob4d charge assuming some threat had been made over the work. Local 1010 did nothing because it knew that is simply the way the contracts had been applied over the years. What is also telling is that clearly two other Local 175 members are doing work not classified as Primarily asphalt work. One worker exclusively works on an excavating machine and one worker works regarding pulling wire or laying pipe. Local 1010 never filed any grievance over their performing work that is more akin

to Local 1010 work. However, no new election or certification is required for the work of those two individuals to come under the 1010 contract.

Local 1010 somehow believes that if you grow into a bigger operation that means it must affect a bargaining unit. Here it simply did not. Local 1010 members do the same work they always did since forever; they just have more of the same work related to larger jobs. The Regional Director was correct in finding that there were no Local 1010 members who primarily performed asphalt paving (except for the foreman of the paving crew who also was a foreman on 1010 excavation crews when there was no asphalt paving for the asphalt crew which was 2-3 days a week). The Regional Director was also correct in finding that the collective agreements essentially had not changed from 2005 as they each recognized their respective jurisdictions; acknowledged that some overlap may exist; and were over the years applied in the same manner. Local 1010 could have attempted to claim that two persons who were members of Local 175 should not be performing certain work; but they did not. (T. 86-88, 219-223) If 1010 also thought that the work of the dedicated asphalt paving crew was somehow covered by their Triumph agreement then why did they not at least try to grab the work on a prospective basis four years ago? Or in 2012 when that agreement was renewed? They did not then because they knew it was different work and nothing has changed.

The Regional Director was correct in finding that no question of representation exists with regard to the existing Local 1010 unit. Local 175 has made no claim for it. Local 1010 has a current collective agreement covering the primary work they perform which does not expire for another year.

The Regional Director has not denied Local 1010 the right to obtain the benefits of certification for a unit for which it now lacks certification. Local 1010 has the certification for those who primarily perform the laying of concrete; which certification expressly excludes those persons who primarily perform asphalt paving. The only persons who primarily perform asphalt paving who are on Triumph's payroll, are those persons working on the dedicated asphalt paving crew. In their daily work, Local 1010 members spend approximately only 1% of their time touching asphalt; hardly a primary task of a worker. And 1010 did not petition for that separate unit. And even though 1010 could have amended its petition to do just that; it chose not to do so. And never produced a showing of interest in regards to that separate group of workers.

For the above factual reasons, and for the reasons succinctly stated in the Decision and Order entered by the Regional Director, the Petitioner's Request for Review should be denied.

Dated: New York, NY

June 24, 2014

Respectfully submitted,

  
Eric B. Chaikin, Esq.

Chaikin & Chaikin  
375 Park Avenue, Suite 2607  
NY, NY 10152  
[chaikinlaw@aol.com](mailto:chaikinlaw@aol.com)

cc: James G. Paulsen, Regional Director  
Barbara S. Mehlsack, Esq., Attorney for Local 1010 (via email)  
Brian Gardner, Esq., Attorney for Triumph (via email)



NATIONAL LABOR RELATIONS BOARD X

In the Matter of:

Triumph Construction Corp., Inc.,  
Employer,

And

Local 1010 Highway, Road & Street Construction  
Laborers Union,  
Petitioner,

Case 29 RC 126206

AFFIRMATION

And

United Plant & Production Workers, Local 175,  
IUJAT,  
Intervenor.

X

I hereby affirm under penalties of perjury that on June 24, 2014 I served a true and accurate copy of the Intervenor's Response to Petitioner's Request for Review of Regional Director's Decision and Order upon the following parties at the below stated email addresses:

Barbara S. Mehlsack, Esq., at [bmehlsack@gkllaw.com](mailto:bmehlsack@gkllaw.com)

Brian Gardner, Esq., at [bg@sullivangardner.net](mailto:bg@sullivangardner.net)

  
Eric B. Chaikin, Esq.